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## CIRCUIT COURT OF THE CITY OF LYNCHBURG.

### PETERS v. CITY OF LYNCHBURG.*

1. MUNICIPAL CORPORATIONS—*Obstruction on sidewalks—Negligence.* It is undoubtedly negligence for a city to establish and maintain on its sidewalk a corner stone projecting four to five inches above the level of the pavement.
2. MUNICIPAL CORPORATIONS—*Obstruction on sidewalk—Contributory negligence.* A citizen who knows of a dangerous obstruction on a sidwalk must exercise ordinary care to avoid accident while passing it. If he voluntarily and unnecessarily encounters it, he takes the risk upon himself.
3. EVIDENCE OF NEGLIGENCE.—Forgetfulness of that which is well known and ought to have been remembered is some evidence of negligence.
4. CONTRIBUTORY NEGLIGENCE—*When not a question for the jury.* If it appears that the plaintiff neglected some duty, and if it is highly probable that if he had not neglected it he would not have suffered the injury, the question of contributory negligence cannot be left to the jury, but must be decided adversely to the plaintiff.

Upon a demurrer to evidence.

The opinion states the case.

HON. E. W. SAUNDERS, Judge:

The essential facts in this case are as follows:

The city of Lynchburg in constructing its sidewalks on Fillmore and Eleventh streets, negligently allowed a corner stone to remain at the inner angle of the intersection of these streets. This stone was about four inches square at the top, and projected from four to five inches above the level of the pavement.

The corner stone is on the theoretical corner, and the whole stone is a part of the sidewalk.

A person turning the corner on the inner angle of the intersection of the two streets would find this stone in his path; but coming from Eleventh into Fillmore, keeping on the outer portion of Eleventh and making the turn to the middle, or outer edge of the sidewalk on Fillmore street, he would entirely avoid this obstruction.

In like manner by keeping in the middle, or on the outer edge of the pavement on Fillmore street, until he reached Eleventh, and then making the turn, a person would avoid the stone.

*Reported by George C. Gregory.

The negligence of the city in establishing and maintaining this projecting stone upon its sidewalks, is undoubted.

The plaintiff, Stephen Peters, was severely injured by falling over this stone on the night of June 16th, 1902.

Mr. Peters, who is a very old man, will be eighty-two in November, 1902.

The streets at the point of injury are poorly lighted, the lights being some little distance therefrom.

The plaintiff's account of the accident can be condensed as follows:

"I started for the mission, which I have been very fond of attending, at half-past eight on the night of the injury. I reckon I was walking rather faster than usual when I got to the corner of Eleventh and Fillmore, and in turning there my foot hit a square rock in the walk that I had never passed there before without watching; always guarded against it night and day, but somehow I do not know what I was thinking about, it must have passed out of my mind entirely. The first I knew of the rock my foot hit it."

Q. "Were you conscious of the fact that you had arrived at the place where the rock was?"

A. "No, if I had, I should not have hit it. I think it was very dark. There was a distant light, but I do not think the light was sufficient to see the rock, but I knew where it was. It was very dark that night, and I do not think I could have seen the rock, but that is immaterial; if I had thought of it, I should not have been hurt, but I did not think of it."

Q. "Is your eye-sight good?"

A. "Good enough for any purpose as to that rock. I think I could see it as well as anybody. I think I always saw it at night when I passed there. I always knew where it was, and think I saw it generally. I did not that night. I had not thought of it."

Q. "Were you conscious of the fact that you had arrived at the point where the rock was?"

A. "I was not, until my foot hit it. Then I knew instantly what was done. Walk always with a cane, which is necessary for the comfort of my walking."

Cross-examination:

Q. "You were perfectly familiar with the position of this stone?"

A. "Perfectly."

Q. "How long have you been living here?"

A. "Seven years next September."

Q. "During that time you have passed this stone a great many times?"

A. "Yes, sir."

And other witnesses established that they knew the location of this stone at the corner of Fillmore and Eleventh streets; that they used these streets, and the public generally used them.

This is a sufficient summary of the testimony for the purposes of a decision of this controversy.

It will appear from the evidence that the plaintiff, alone and unassisted, undertook to walk from his house to the point at which he took the car a short distance from his house. He was perfectly familiar with the location of the stone, and had seen and avoided it many times, both by day and night. He states that his eye-sight was good enough for any purpose as to the stone; that he thought he could see it as well as anybody; that he thought that he always saw it at night when he passed there; that he always knew where it was; that he did not see it that night; that he had not thought of it; that he was not conscious that he had reached it, until he struck it; that he had been living in Lynchburg seven years; had passed the stone many times, and was perfectly familiar with its position.

The defendant relies upon the plaintiff's contributory negligence to defeat his recovery.

The plaintiff had the right to use the sidewalk, but it is evident that his obligation of care was very different from that of a citizen who used the sidewalk in ignorance of the existence of the obstruction.

In *Marpole's Case,* 97 Va. 594, the railroad company negligently maintained an overhead bridge too low for a brakeman on the top of the car to pass under it, in a standing position.

Marpole, a brakeman who had been in the employment of the company for more than six years, and who had passed the bridge in question day and night many times, was knocked from his car one night by this bridge, and severely injured. The company failed to maintain signal lights and warning ropes at the bridge.

This was known to Marpole. It was claimed for the plaintiff that, owing to the darkness, fog, or natural or artificial causes, incident to the plaintiff's employment, including an unusual escape of steam

at the time, he could not fix his position, and in consequence of this was injured, although exercising at the time reasonable care and foresight.

The trial court gave an instruction which, with other things, set out, that if the plaintiff knew of the danger of the bridge at which he received the alleged injuries, or ought to have known of it before the accident, and continued in the employment of the company, he assumed the risk of injury, and could not recover, unless the jury further believed from the evidence that owing to the circumstances existing at the time of the accident, he could not by ordinary care and foresight discover the locality and his approach to the dangerous locality.

The supreme court held that the *proviso* to this instruction was error; that the circumstances of darkness, fog, etc., were immaterial, and the plaintiff was guilty of contributory negligence.

Of course the doctrine of this case cannot be applied to its fullest extent to the case in hand, but it is extremely pertinent. All that can be claimed in Mr. Peters' behalf, is that at the time of the accident he was not thinking of the stone; that there was not light enough, and the stone was not conspicuous enough for the obstruction to be forced upon his attention, and that under such circumstances he was using the sidewalk with reasonable care at the time of the injury.

In order to make this contention good, it would be necessary to establish the doctrine that a man who knows of an obstruction, who has often avoided it, and who can see it perfectly well at night when looking for it, can by simply excluding the contemplation of the object from his mind, in a word, by not thinking of it, at a time when properly it should be uppermost in his thoughts, avoid the imputation of contributory negligence when, in his accustomed use of the streets, he falls over the obstruction, and is injured thereby.

This would be to eliminate the element of knowledge from such a situation.

But it is the duty of a citizen to avail himself of his knowledge in his use of the streets. An old man of 80, who ventures out of doors on a dark night, should certainly be measurably alert to avoid known danger. It was no occult danger he went out to encounter, no pitfall unknown to him, into which he might fall, but a small

rock of whose locality he was well aware, and which he could perceive and avoid when he was looking for it. Immersed in thought on other matters, the plaintiff was oblivious to his surroundings. There was no reason why this should be so. He had no duties, like those of the brakeman, to distract his attention; there was no unusual occurrence on the streets to disturb the balance of his faculties at the moment of danger. He had nothing, or should have had nothing on his mind, but how to walk safely for a few yards, and avoid stumbling over a well known obstruction. This is not the case of *Danville* v. *Robinson,* in 99 Va., p. 451. In that case the plaintiff was aware that the bridge where he was walking was out of order, but he was using it with reasonable care, walking on the main track, and in the light, when approaching vehicles caused him to step up on the sidewalk. He continued to proceed on the sidewalk, which had been repaired at some points by the insertion of new planks, until he stepped upon a plank which had a defective sill under it, a defect unknown to him, and not open and obvious to a pedestrian. The sill gave way under the plaintiff and he was injured. The supreme court held, and very properly, that his conduct did not defeat recovery.

In *Winchester* v. *Carroll,* 99 Va., p. 728, it is said in the syllabus: "Generally negligence is a mixed question of law and fact to be determined by the court, unless the evidence is conflicting, or the facts disputed, in which event the question should be submitted to the jury, but inasmuch as instructions are predicated on a hypothetical state of facts, when from the facts assumed it is manifest that an ordinarily prudent person would not have acted in the manner supposed, it is the duty of the court to tell the jury, if they believe from the evidence that such conduct has been established, as a matter of law, it constitutes contributory negligence, and bars recovery." Now the evidence in the case at hand is not conflicting, and the facts are not disputed.

If the state of a street is such as to render its use obviously and imminently dangerous, there can be no recovery by one cognizant of the fact.

If Mr. Peters knew that the stone was on the sidewalk, and if at that point it was so dark that a pedestrian using the sidewalk and looking for the stone, could not perceive it, then in leaving his house at half-past eight to traverse this particular pavement Mr.

Peters was incurring an obvious and imminent danger. If he knew that the stone was there, and if there was light enough for him to perceive the obstruction, when looking for it, then in venturing forth on that night with his mind on other things, the plaintiff was not using ordinary care, bearing in mind the circumstances of his knowledge of the situation.

In either event he cannot recover.

The case of *Danville Street Car Co.* v. *Watkins,* 97 Va. 713, is another case immediately in point. In that case a wire was negligently allowed to hang across a railway track, so that a brakeman standing on the cars of a train passing at that point could be struck by it. A brakeman who was aware of the existence of this wire, undertook in the discharge of his duties on the train, to pass from one car to another, and while so doing was struck by the wire, and injured. If he had had the existince of the wire in mind at the time of the injury, he could easily have avoided coming into contact with it, and escaped harm. Day after day, prior to the time of actual hurt, the brakeman passed in safety under this wire. On the particular occasion, just as in this case, the plaintiff neglected an obvious precaution necessary to his safety. He knew, but did not think, and not thinking, was injured in consequence.

The court in that case said: "It was the duty of the plaintiff to exercise ordinary care to prevent injury to himself, and he was guilty of contributory negligence, if he was himself the author of any part of the injury of which he complained, or if by the exercise of reasonable care upon his part, he could have avoided the consequences of the negligence ascribed to the defendant." It is settled law that a citizen with knowledge of defects in a street, must exercise ordinary care in using that street, to avoid accident. Mr. Peters in going into known danger without thinking, was not using ordinary care.

Where there is danger, and the peril is known, whoever encounters it voluntarily and unnecessarily, cannot be regarded as exercising ordinary prudence, and therefore does so at his own risk.

One who knows of a dangerous obstruction in a street, or sidewalk, and yet attempts to pass it, when on account of darkness, or other hindrance, he cannot see to avoid it, takes the risk upon himself. For a much greater reason does he take the risk on himself, if seeing an obstruction and knowing its dangerous character, he

deliberately goes into, or upon it, when he is under no compulsion to go, or might avoid it by going around.

It will not avail a plaintiff that he was not fully aware of his danger; for a plaintiff is bound to know where the circumstances are known to him or the hazard is apparent to a reasonably prudent man. 4 L. R. A., p. 214, notes.

Forgetfulness of that which is well known, and ought to have been remembered, is some evidence of negligence.

Attempting in the dark to pass an open cellar way in a sidewalk, with knowledge of same, but for the time forgetting its existence, is contributory negligence, and will cast upon the plaintiff the burden of showing that he was justified in exposing himself to the danger.

If it appears that the plaintiff neglected some duty, and highly probable that, if he had not neglected it, he would not have suffered the injury, the question of contributory negligence cannot be left to the jury, but must be decided adversely to the plaintiff. 1 Sherman & Red., sec. 110, and notes.

In walking or driving at night, the exercise of ordinary care requires greater vigilance than in the day.

Driving in the dark without thinking is not ordinary care. In one case plaintiff knew of the existence of a pit into which he fell while walking at night, absorbed in thought and not looking where he was going. This was held to be contributory negligence. Id., sec. 377.

Another case in point is *Courtney* v. *City of Richmond*, 32 Gratt. 792. In this case the plaintiff had occasion to make a hurried visit to a drug store in her neighborhood.

She knew that between her house and the drug store the sidewalk was defective, so she crossed the street to avoid the obstruction. On her return she omitted this precaution, and in her haste fell over a loose brick, and was severely injured. The city was negligent in the first instance, having knowledge of the defect, and allowing it to continue for three or four months. The plaintiff too was aware of the obstruction, and but a few minutes before had avoided it, but the circumstances were certainly sufficient to drive from her mind all recollection of the defect, and excuse her forgetfulness. She was hurrying home with medicine for a dying niece at the time of the accident. Still the supreme court declared she was not entitled

to recover, even conceding the negligence of the city, which was doubted.

A portion of the opinion is as follows: "According to her own evidence, she knew of the broken place in the sidewalk, and with ordinary care might have avoided it. Reasonable care and diligence on her part would have prevented the injury. It is always essential to fix liability for injuries received by accident, that the plaintiff should use reasonable and ordinary care to avoid the accident. A party complaining of injury cannot recover, if it appears by want of ordinary care and prudence he contributed directly to the injury. Where negligence is the issue, it must be a case of unmixed negligence to justify recovery." It is not allowed either to the court or the jury to apportion two concurring negligences, and determine who, upon the whole, is most to blame. If it was within my power to declare whether upon the whole the city, or Mr. Peters, was most at fault, and my judgment depended upon this determination, then my finding in this case might be different. As it is, and as I understand the law of this state, the finding of the court upon the demurrer to the evidence must be in favor of the defendant.